IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-6609

Supreme Court, U.S.
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MICHAEL RODAK, JR.

EUGENIO and ALICIA JIMENEZ, by their father and next friend, RAMON JIMENEZ, *et al.*,

Appellants,

v.

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR APPELLANTS

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January, 1974

Washington, D.C. • CLB PUBLISHERS • LAW PRINTING CO. • (202) 393-0625

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Appellants,

v.

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the United States District Court is reported at 353 F. Supp. 1356, *sub nomine Jimenez v. Richardson.* The opinions of the Hearing Officer and Appeals Counsel of the Social Security Administration of the Department of Health, Education and Welfare are nowhere reported.

JURISDICTION

This suit was brought in the United States District Court, pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. §405(g), seeking review of a final decision of the Secretary of Health, Education and Welfare. The Judgment of the duly convened three-judge panel of the District Court was entered on January 30, 1973, and notice of appeal was filed in that Court on February 22, 1973. The jurisdiction of the Supreme Court to hear this appeal is conferred by Title 28, United States Code, Section 1253. *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd* 409 U.S. 1069 (1972); and *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972).

THE STATUTE INVOLVED

The statute involved in this suit, Section 216(h)(3) of the Social Security Act, 42 U.S.C. §416(h)(3) provides:

> (3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:
>
> (A) in the case of an insured individual entitled to old-age insurance benefits (who was not, in the month preceding such entitlement, entitled to disability insurance benefits)–
>
> (i) such insured individual–
>
> (I) has acknowledged in writing that the applicant is his son or daughter,
>
> (II) has been decreed by a court to be the father of the applicant, or

(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his son or daughter,

and such acknowledgement, court decree, or court order was made not less than one year before such insured individual became entitled to old-age insurance benefits or attained age 65, whichever is earlier; or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to be the father of the applicant and was living with or contributing to the support of the applicant at the time such insured individual became entitled to benefits or attained age 65, whichever first occurred;

(B) in the case of an insured individual entitled to disability insurance benefits, or who was entitled to such benefits in the month preceding the first month for which he was entitled to old-age insurance benefits–

(i) such insured individual–

(I) has acknowledged in writing that the applicant is his son or daughter,

(II) has been decreed by a court to be the father of the applicant, or

(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his son or daughter,

and such acknowledgement, court decree, or court order was made before such insured individual's most recent period of disability began; or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to be the father of the applicant and was living with or contributing to the support of that applicant at the time such period of disability began;

(C) in the case of a deceased individual–

(i) such insured individual–

(I) had acknowledged in writing that the applicant is his son or daughter,

(II) had been decreed by a court to be the father of the applicant, or,

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter,

and such acknowledgement, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

QUESTION PRESENTED

Does Section 216(h)(3) of the Social Security Act (42 U.S.C. §416(h)(3)) deny to illegitimate children their rights to due process of law guaranteed by the Fifth Amendment because it requires such illegitimate children, unlike any legitimate children, to have been born and to have established paternity before their fathers became disabled?

STATEMENT OF THE CASE

Ramon Jimenez is a wage earner insured by the Social Security Act. In October, 1963, he became entitled to disability insurance benefits for himself and his dependents on the basis of a "period of disability" beginning

April 1, 1963. He had been married in about 1937 and as of 1963 had five minor, legitimate children. His wife was entitled to and received wife's insurance benefits and his legitimate children were entitled to and received children's insurance benefits, beginning in 1963.

Several years earlier Ramon Jimenez had separated from his wife, and in about 1961 had begun living with Elizabeth Hernandez, whom he has never married. Elizabeth and Ramon had three children, Magdalena, born August 13, 1963, Eugenio, born January 18, 1965, and Alicia, born February 24, 1968. These three children have lived with Ramon Jimenez all their lives; he has formally acknowledged them to be his children, has supported and cared for them since their birth, and has in fact been their sole caretaker since their mother left the household late in 1968.

On August 21, 1968, Ramon Jimenez filed an application for child's insurance benefits on behalf of these three children. Magdalena was found entitled to child's insurance benefits.[1] However, the claims of Eugenio and Alicia were denied on the grounds that they did not meet the requirements of 42 U.S.C. §416(h)(3), since neither child's paternity had been acknowledged or confirmed through evidence of domicile and support before the onset of their father's disability, an obviously impossible requirement because neither child had been born at that time. In all other respects Eugenio and Alicia are eligible to receive child's insurance benefits; their applications

[1] Although she was born after the onset of her father's disability, she had been conceived and was in being and living with and being supported, in utero, by her father, before he became disabled.

were denied only because they are illegitimate children whose dates of birth come after the onset of their father's disability. (All of the facts herein can be found in the Hearing Examiner's Decision, App., pp. 3-8).

Ramon Jimenez appealed this denial throughout the administrative hierarchy of the Social Security Administration, but his claim on behalf of his children was repeatedly denied. He subsequently brought an action on their behalf in the United States District Court, attacking the constitutionality of the section upon which the Social Security Administration relied in denying children's benefits to Eugenio and Alicia. The United States District Court upheld the constitutionality of 42 U.S.C. §416(h)(3) and dismissed the suit. It is from that dismissal that this appeal is taken.

SUMMARY OF ARGUMENT

Appellants contend that Section 216(h)(3) of the Social Security Act (42 U.S.C. §416(h)(3)) violates their right to equal protection of the laws, as guaranteed by the due process clause of the Fifth Amendment, by requiring that illegitimate children, as opposed to legitimate children, be born (and acknowledged, or living with or supported by, their fathers) before the onset of the fathers' disability or old age in order to receive Social Security benefits.

This discrimination against after-born illegitimate children created by Section 216(h)(3) is arbitrary and irrational and bears no rational relation to the purpose of the Social Security Act, which is to provide support to wage earners and their dependents when the wage earners can no longer work due to old age, disability, or death.

The discrimination against illegitimate children herein is perfectly analogous to those instances of discrimination

against illegitimate children which have been found unconstitutional by this Court in several recent cases.

The justifications for the discrimination offered by the Government and in one instance relied upon by the District Court–that §416(h)(3) children as a group are less likely to have been supported by their fathers than other children, and that the classification is necessary to prevent fraudulent claims–are constitutionally inadequate and incorrect, irrelevant and misleading.

These justifications amount essentially to an argument for administrative efficiency, which alone cannot justify blanket discrimination against an entire class of potential recipients. An irrebuttable presumption, often contrary to fact, lacking a reasonable relation between the known fact and the presumed one, and irrevocably excluding many otherwise fully eligible applicants, is a violation of due process.

Illegitimacy is and should be treated as a suspect class, since it is an accident of birth, like race and national origin, over which the individual concerned has no control, and because illegitimate children suffer severe social opprobrium and are politically powerless. Since illegitimacy is a suspect class, discrimination against illegitimates can be justified only by a compelling governmental interest. No such compelling interest exists or has been suggested by the appellee.

ARGUMENT

Eugenio and Alicia Jimenez are illegitimate children, acknowledged by and living with their disabled wage-earner father. They were born after he became disabled. They have been denied child's insurance benefits, based on the requirement, in section 216(h)(3) of the Social Security Act (42 U.S.C. §416(h)(3)), that they, and all

other illegitimate children defined therein, have to have been acknowledged or supported, *before* the onset of their wage-earner father's disability (or old age)[2] in order to qualify for such benefits. Since they were in fact born after the onset of their father's disability, they and other dependent, otherwise eligible children cannot possibly comply with this requirement. This arbitrary and irrational exclusion of a class of children from Social Security benefits, imposed only on illegitimate children, violates the right of those children to due process of law,[3] as this Court has determined in affirming orders in *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd* 409 U.S. 1069 (1972); and *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *aff'd* 409 U.S. 1069 (1972); and in overturning state laws that similarly discriminated against illegitimate children, e.g., *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972), *Gomez v. Perez*, 409 U.S. 535 (1973), and *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973). Several courts have recognized that section 216(h)(3) is unconstitutional as applied to after-born

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[2] Ramon Jimenez, the father of Eugenio and Alicia Jimenez, is disabled, and his children have been denied benefits specifically pursuant to section 216(h)(3)(B) concerning children of *disabled* wage earners, but the same pre-eligibility requirement appears in section 216(h)(3)(A) concerning children of "aged" wage earners, and so references are made herein to both disability and old age.

[3] It is well established that the Due Process Clause of the Fifth Amendment includes a guarantee of equal protection of the laws as strong as that stated explicitly in the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *aff'd* 409 U.S. 1069 (1972).

illegitimates. In *Beaty v. Weinberger*, 478 F.2d 300 (5th Cir. 1973), the Court of Appeals for the Fifth Circuit held unconstitutional section 216(h)(3) because of its discriminatory treatment of illegitimate children born after their fathers became disabled. That case is now pending on appeal before this Court (No. 73-521). In *Howard v. Weinberger* (D. Minn. Civil Action No. 4-71-Civ-301 (Aug. 9, 1973), the court made the same ruling. And in *Severance v. Weinberger*, 362 F. Supp. 1348 (D.D.C. 1973), a three-judge district court held unconstitutional that portion of section 216(h)(3) that excluded from benefits those illegitimate children born before their father's 65th birthday.

I.

SECTION 216(h)(3) OF THE SOCIAL SECURITY ACT INVIDIOUSLY DISCRIMINATES AGAINST AFTER-BORN ILLEGITIMATE CHILDREN BY DENYING THEM SOCIAL SECURITY BENEFITS.

Children are made eligible for Social Security benefits by section 202(d) of the Social Security Act (42 U.S.C. §402(d)), which in pertinent part provides that "Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits" who "has filed application for child's insurance benefits," and is dependent upon such individual at the time of application shall be entitled to a child's insurance benefit.[4]

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[4] 202(d) (42 U.S.C. §402(d)):

(d)(1) Every child (as defined in section 216 (e)) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual if such child–

Section 216(e) of the Act (42 U.S.C. §416(e)) provides:

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 223(d)) which began before he attained the age of 22, and

(C) was dependent upon such individual–

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, at the time of such death, or

(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits,

shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits . . . .

* * * * *

(3) A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) unless, at such time, such individual was not living with or contributing to the support of such child and–

(A) such child is neither the legitimate nor adopted child of such individual, or

(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 216(h)(2)(B) or section 216(h)(3) shall be deemed to be the legitimate child of such individual . . .

> The term "child" means the child or legally adopted child of an individual.[5]

The somewhat bewilderingly reflexive definition of section 216(e) is amplified by sections 216(h)(2) and (3) which describe how the Secretary is to determine whether an applicant is in fact a "child" of an insured individual. Section 216(h)(2)(A) makes a "child" any child who may inherit his parent's personal property under the law of intestate succession of the State of his parent's domicile;[6] section 216(h)(2)(B) deems an applicant a "child" if his parents went through a marriage ceremony that resulted in a purported, but nonetheless invalid marriage;[7] and section 216(h)(3) deems an

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[5] This section goes on to treat the problems of adopted and stepchildren.

[6] 42 U.S.C. §416(h)(2)(A):

> In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

[7] 42 U.S.C. §416(h)(2)(B):

> If any applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother

applicant to be a "child" if he was born, and acknowledged in writing, or found by a court to be the child of his father, or was the beneficiary of a court support order, or was living with or being supported by his father, *before the commencement of his insured parent's disability, old age, or death.*

It is this latter route to eligibility that is at issue here. The section 216(h)(3) of the Social Security Act (42 U.S.C. §416(h)(3)), states that:

> (3) an applicant who is the son or daughter of a fully or currently insured individual but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such individual if:
>
> (A) in the case of an insured individual entitled to old-age insurance benefits (who was not, in the month preceding such entitlement, entitled to disability insurance benefits)–
>
> (i) such insured individual–
>
> (I) has acknowledged in writing that the applicant is his son or daughter,
>
> (II) has been decreed by a court to be the father of the applicant, or
>
> (III) has been ordered by a court to contribute to the support of the applicant because the applicant is his son or daughter,

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or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(B), would have been a valid marriage.

and such acknowledgement, court decree, or court order was made not less than one year before such insured individual became entitled to old-age insurance benefits, or attained age 65, whichever is earlier; or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to be the father of the applicant and was living with or contributing to the support of the applicant *at the time such insured individual became entitled to benefits or attained age 65, whichever first occurred;*

(B) in the case of an insured individual entitled to disability insurance benefits, or who was entitled to such benefits in the month preceding the first month for which he was entitled to old-age insurance benefits–

(i) such insured individual–

(I) has acknowledged in writing that the applicant is his son or daughter,

(II) has been decreed by a court to be the father of the applicant, or

(III) has been ordered by a court to contribute to the support of the applicant because the applicant is his son or daughter,

and such acknowledgement, court decree, or court order was made before such insured individual's most recent period of disability began; or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to be the father of the applicant and *was living with or contributing to the support of that applicant at the time such period of disability began;*

(C) in the case of a deceased individual–

(i) such insured individual–

(I) had acknowledged in writing that the applicant is his son or daughter,

(II) had been decreed by a court to be the father of the applicant, or,

(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter,

and such acknowledgement, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died. (Emphasis added.)

As is apparent from these sections, most children, in order to obtain child's insurance benefits, are either presumed eligible or need only meet certain eligibility requirements at the time the application for benefits is filed on their behalf, regardless of when they first met those requirements. However, those children–illegitimate children–who would prove their relationship with their fathers under Section 416(h)(3), must have been born, and have met the other conditions, before their fathers died or became aged or disabled.[8]

[8]Children born before, but technically meeting the other conditions after the onset of their father's disability or old age, are also excluded by section 216(h)(3), but for purposes of convenience appellants will refer only to those children who are *born* after the onset of disability or "old age."

Eugenio and Alicia Jimenez were born after their father became disabled. They are consequently absolutely barred from eligibility for child's insurance benefits as long as their father is living. It does not help that they are able to prove conclusively that they are the dependent children of Ramon Jimenez; the statute, simply because of the timing of their births, prevents them from offering that proof. If they were legitimate children, they would not have to offer proof of their relationship with their father, and it would not matter whether they had been born before or after he became aged or disabled. If they were illegitimate but had been born before their father became disabled, they would be allowed to offer proof of their actual relationship with their father. Only because they are *illegitimate children born after the onset of their father's disability*, and therefore by definition acknowledged and supported only after the onset of such disability, are they excluded. Section 216(h)(3) thus invidiously discriminates against illegitimate children and a subclass of after-born illegitimate children. This discrimination violates the equal protection guarantees embodied in the Fifth Amendment's Due Process Clause.

II.

THE DISCRIMINATION WORKED BY SECTION 216(h)(3) VIOLATES THE RIGHT OF AFTER-BORN ILLEGITIMATE CHILDREN TO DUE PROCESS OF LAW BECAUSE IT IS NOT RATIONALLY BASED AND IS NOT CONSISTENT WITH THE PURPOSE OF THE SOCIAL SECURITY ACT.

Various formulations have been used to measure a statute against the constitutional guarantee of equal protection, but the minimum requirement is that a statutory classification must not be patently arbitrary,

but must bear a rational relationship to a suitable purpose of the Act creating the classification. E.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1856). Or, as stated in the majority opinion in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972):

> As in all equal protection cases . . . the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment.

The classification and exclusion of after-born[9] illegitimate children affected by section 216(h)(3) fails to meet this most basic test and must therefore be found unconstitutional.

The purpose of Title II of the Social Security Act (Old Age, Survivors, and Disability Insurance (OASDI)) is the provision of support to a wage earner and/or his dependents, when by reason of old age, disability, or death the wage earner has lost his earning power.[10] Exclusion of a group of dependents, in this case, after-born illegitimate children, most certainly does not further the governmental interest in providing support for dependents.[11] And to classify those who will be ex-

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[9] For purposes of convenience, children born after the onset of their father's disability or old age will be referred to hereinafter as "after-born" children, and children born before the onset of their father's disability or old age will be referred to as "before-born" children.

[10] *Delno v. Celebrezze*, 347 F.2d 159, 161 (9th Cir. 1965); S. Rep. No. 1669, 1950 U.S. Code Cong. Serv., p. 3288.

[11] Thirty-seven per cent of all dependents of wage earners receiving benefits pursuant to Title II are "children" of wage earners (D.H.E.W., S.S.A., Office of Research and Statistics, Baltimore, prepared June, 1973, Statistics from 12/72), but despite

cluded, will be accorded differential treatment, based on the marital status of the parents of a child applicant and the date of the beginning of the father's Social Security eligibility[12] (wholly irrespective of the child's need of support, experience of support, right to support, or his actual relationship with his father) only heightens the original deviation from the primary governmental interest, for the grounds for such a classification are "patently arbitrary."

A child's need for and right to parental support does not depend on whether his birth occurred before or after the onset of his parent's disability or "old-age." Of course, once a wage earner stops working he can no

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the importance of Social Security insurance to "children," a significant group of potential child recipients is excluded, by the statutes at issue herein.

[12]If the definition of disability for purposes of Title II eligibility were so restrictive, as it is not, that a "disabled" wage earner were unable to father a child, or if age were a barrier to procreation, for men, as it clearly is not, then a valid distinction for purposes of Title II eligibility could perhaps be made between children born before the onset of "old age" or disability and those born after the onset of these conditions. Such a distinction would then be dependent on factors properly relating to Social Security insurance eligibility, assuming that the distinction were applied equally to legitimate and illegitimate children. However, given the fact that a wage earner can easily be so disabled as to be unable to engage in substantial gainful employment, and so be eligible to receive disability benefits, and still be physically able to father a child (see section 223(a) of the Social Security Act (42 U.S.C. §423(a)); 20 C.F.R. §404, Subpart P, Appendix; and, e.g., *Allison v. Celebrezze*, 238 F. Supp. 667 (W.D. South Carolina 1964)), and that a 65 year old is able to father a child, a distinction between children born before or after the onset of these conditions is unrelated to the purposes of the Social Security Act.

longer provide support for his dependents directly from current earnings, so the likelihood of support from current earnings is different after the onset of disability or old age. But under the Social Security Act the relevant factor is not the source of support, or the past receipt of support, but the right to support.[13] A child born after his father becomes disabled needs and has a right to support just as much as his sibling who was born before the onset of their father's disability.

Congress apparently recognized the general irrelevance of the time of birth to the statutory purpose, for no time-of-birth requirements are imposed on legitimate children. Rather, the before-born requirement is imposed only on illegitimate children. The irrationality of the before-born/after-born distinction is clearly illuminated when examined in the narrow context in which it is found. The irrelevant factor of the time of birth relation to the onset of disability or old age is combined with the irrelevant fact of the marital status of the parents to exclude an arbitrary group of hapless children.

If there were a meaningful distinction between before-born and after-born children, it is impossible to understand why that distinction would not be equally significant for legitimate children as for illegitimate

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[13]See section 202(d)(3) under which most children are deemed to be dependent on their parents for purposes of Social Security eligibility, regardless of whether or not they are living with or being supported by their parents. And see House-Senate Conference Comm. Rep. on 1965 Amendments to Social Security Act, 111 Cong. Record 18387 (July 27, 1965) and Report of the Advisory Council on Social Security, The Status of the Social Security Program and Recommendations for its Improvement, at 67 (Washington, D.C. 1965).

children.[14] Whatever meaningful distinction, for purposes of the Social Security Act, between legitimate and illegitimate children there may be, it is impossible to understand how that distinction relates to the time of birth of the child applicant.

The classification created by section 216(h)(3) is thus arbitrary on its face: the requirement that illegitimate children defined in this section must be born before the onset of their father's disability or old age is not in any way reasonably related to the purpose of the Social Security Act. The before-born requirement can therefore be understood only as an arbitrary discrimination against illegitimate children.

Because the discrimination challenged here is one against "after-born" illegitimate children, the government has attempted to distinguish this case from other cases involving illegitimate children on the ground that this case involves only certain and not all illegitimate children. That is a false distinction because in fact *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), one of the leading recent cases on the rights of illegitimate children, concerned only unacknowledged illegitimate children and not all illegitimate children, and this Court held that "[I]t makes no difference that illegitimates are not so absolutely or broadly barred here as in *Levy*; the discrimination remains apparent." 406 U.S. 164.[15]

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[14]And surely the distinction would be as true for illegitimate children whose parents have gone through an invalid ceremonial marriage or those who live in states that allow them to inherit from their fathers, made eligible by sections 216(h)(2)(A) and (B).

[15]Subclassifications exist in other contexts. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), the classification struck down did not affect all servicewomen; only those whose husbands were dependent on the servicewomen for more than half their support.

Similarly, in *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd* 409 U.S. 1069 (1972), and *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *aff'd* 409 U.S. 1069 (1972), not all illegitimate children were barred from benefits–just those children whose legitimate siblings had exhausted the maximum family benefits. In *Griffin* and *Davis*, the "accident of birth" (*Frontiero v. Richardson*, 411 U.S. 677 (1973)) of illegitimacy was coupled with the accident of birth of number and types of siblings. Herein the accident of birth of illegitimacy is coupled with the accident of the birth's timing. In neither event can the Fifth Amendment bar to discrimination against illegitimates be evaded by the subclassification. Such an evasion would legitimize a twofold "accident of birth" as a type of double negative, each accident cancelling out the other. But the two characteristics do not cancel each other out; they are summed to create a bar to benefits. The discrimination effected by section 216(h)(3) is one against illegitimate children: only illegitimate children are subjected to the previously-born requirement, legitimate children are not.

A. This Court Has Consistently Held That Discrimination Against Illegitimate Children Is a Violation of Equal Protection Guarantees.

This Court has dealt with discrimination against illegitimate children no fewer than eight times in the last six years,[16] and in every case but one[17] has struck down classifications discriminating against illegitimate children as violations of the children's rights to equal protection, under either the Fourteenth Amendment or the Fifth Amendment. Opinions in these cases have not focused on the question of precisely what equal protection standards must be used to judge laws relating to illegitimate children. As will be shown later (*infra*, at 39), the Court appears to be on the verge of holding that statutes creating classifications based on illegitimacy must be subject to strict judicial scrutiny and that the classifications must be necessary to further a compelling governmental interest. Whatever equal protection standards have been applied, the Court has in every case required, at a minimum, that any discrimination against illegitimate children bear a reasonable relation to the overall purpose of the Act in which it is found.

The first two cases that invalidated discrimination against illegitimate children were *Levy v. Louisiana*, 391

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[16] *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glona v. American Guarantee and Liability Ins. Co.*, 391 U.S. 73 (1968); *Labine v. Vincent*, 401 U.S. 532 (1971); *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972); *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd* 409 U.S. 1069 (1972); *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *aff'd* 409 U.S. 1069 (1972); *Gomez v. Perez*, 409 U.S. 535 (1973); *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973).

[17] *Labine v. Vincent*, footnote 16, *supra*.

U.S. 68 (1968) and *Glona v. American Guarantee and Liability Insurance Co.*, 391 U.S. 72 (1968). Both concerned the Louisiana wrongful death statute, which denied recovery to illegitimate children for the death of their mothers, and to mothers for the death of their illegitimate children. The Court struck down the discrimination against illegitimate children in both instances, holding that "legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted." *Levy v. Louisiana*, 391 U.S. 68, 71.

Mr. Justice Douglas wrote, in the majority opinion in *Levy*, that "it is invidious to discriminate against [illegitimate children] when no action, conduct, or demeanor of theirs is possibly relevant" to the harm complained of. 391 U.S. 68, 72. The clear minimal import of these decisions is that the classification of illegitimacy, to be constitutionally acceptable, must be reasonably related to the primary purpose of the law in which it appears.

In *Weber v. Aetna Casualty & Surety*, 406 U.S. 164 (1972), this Court considered the constitutionality of a provision in the Louisiana Workmen's Compensation Act that established recovery rights for unacknowledged illegitimate children different from those granted legitimate children and acknowledged illegitimate children. Petitioners, illegitimate children (by their mother and next friend), claimed workmen's compensation benefits after the death of their father, and were denied benefits because their legitimate half-siblings had exhausted the maximum allowable amount of compensation. The illegitimate children claimed that this preference given to legitimate children violated the Equal Protection Clause of the Fourteenth Amendment. The statute in that case was designed to provide compensatory support for those supposedly, or legally possibly, dependent on a wage earner. And in that case, as it had in 1968 in *Levy*, *supra*,

and *Glona, supra,* the Court recognized that "the fact of a child's birth out of wedlock bore no reasonable relation to the purpose" of statutes involving compensation for loss of support, and therefore struck down the provision. *Weber* at p. 168. The Court based its ruling on an understanding that legitimate and illegitimate children can have essentially identical relationships with and dependencies on their parents, and that their legal status is not therefore a permissible means by which to distinguish between them in the context of a statute relating to dependency:

> An unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock, or an illegitimate later acknowledged. So far as this record shows, the dependency and natural affinity of the unacknowledged illegitimate child for her father were as great as those of the four legitimate children whom Louisiana law has allowed to recover. The legitimate children and the illegitimate child all lived in the home of the deceased and were equally dependent upon him for maintenance and support. 106 U.S. 164, 169.

In *Weber*, the dependency and affinity of the illegitimate child were "as great" as those of the legitimate children. In the instant case, the dependency and affinity of the illegitimate children specifically involved herein are greater than that of the legitimate children: Ramon Jimenez lives, alone, with his illegitimate children; he has cared for them all their lives; he has not lived with his legitimate children (who do receive Social Security benefits on his account) for more than ten years. (App. p. 6).

In *Weber* this Court distinguished, on grounds that are equally applicable here, its ruling in *Labine v. Vincent*,

401 U.S. 532 (1971) that Louisiana intestacy laws barring an acknowledged illegitimate child from sharing equally with legitimate children in their father's estate were constitutional. *Labine* is the one case in which the Court has upheld a discrimination against illegitimate children. *Labine*, said this Court, "reflected, in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders." *Weber* at p. 170. Moreover, in *Labine* the statute governing intestate succession was designed to reflect the presumed intent of the decedent who could have modified his daughter's disfavored position by executing a will, and from his failure to do so, might be assumed to possess that intent or at least not to possess a contrary one. In *Weber*, on the other hand, the decedent was legally unable to make his daughter eligible to receive an equal share of workmen's compensation benefits. Similarly, in this case, Ramon Jimenez is unable to make his children Eugenio and Alicia eligible to receive benefits. He has acknowledged them, has always lived with them and provided what support he could for them, but he cannot make them eligible to receive benefits because he cannot change the time of their birth or the time of the onset of his disability. *Labine* is thus inapplicable. It has effectively been limited to its own facts.

In 1972 and 1973 this Court considered five cases concerning the constitutional rights of illegitimates, and after carefully distinguishing *Labine* in the opinion in *Weber*, the Court did not find it necessary to refer to *Labine* again. *Weber* controlled in *Gomez v. Perez*, 409 U.S. 535 (1973), and in *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973), as it must have in the affirmances in *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *aff'd* 409 U.S. 1069

(1972), and *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd* 409 U.S. 1069 (1972), and as it must here.

In *Griffin v. Richardson, supra,* and *Davis v. Richardson, supra,* the Court again considered the classification of illegitimacy in the context of a statute involving compensation for loss of support. The Court summarily affirmed District Court decisions declaring unconstitutional section 203(a) of the Social Security Act (42 U.S.C. 403(a)), a section that discriminated against exactly the same statutorily defined group of children discriminated against by the requirement challenged here: illegitimate children who would otherwise qualify for Social Security benefits under section 216(h)(3). The section stricken in *Griffin* and *Davis* relegated 216(h)(3) children to secondary status, allowing them to receive benefits only if the statutory "family maximum" benefits were not consumed by legitimate siblings. This Court affirmed decisions in these cases holding that discrimination against illegitimate children, more specifically, discrimination against illegitimate children defined by section 216(h)(3) of the Social Security Act, "is an invidious discrimination, unrelated to the purpose of the law and to any legitimate legislative consideration governing the Social Security Act .... To distinguish [these illegitimate children] from other children with the same needs and the same parent, solely on the basis of a condition of birth ... is impermissible." *Davis v. Richardson*, 342 F. Supp. 588, 593 (1972), *aff'd* 409 U.S. 1069.

Subsequently, *Gomez v. Perez*, 409 U.S. 535 (1973), held that Texas could not constitutionally grant legitimate children a judicially enforceable right to support from their natural fathers while denying that right to illegitimate children. In a *Per Curiam* opinion, the Court broadly declared that "a State may not invidiously

discriminate against illegitimate children by denying them substantial benefits accorded children generally." 409 U.S. 535, 537.

In *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973), this Court's most recent ruling concerning illegitimate children, the plaintiffs challenged a provision of the New Jersey "Assistance to Families of the Working Poor" program, on the grounds that its limitation only to families composed of "two adults of the opposite sex ceremonially married to each other" and their children effectively discriminated against illegitimate children. In its *Per Curiam* ruling, the Court referred to *Weber, supra, Levy, supra, Gomez, supra, Davis, supra,* and *Griffin, supra,* and found that

> Those decisions compel the conclusion that appellants' claim of the denial of equal protection must be sustained. For there can be no doubt that the benefits extended under the challenged program [assistance to families of the working poor] are as indispensable to the health and well-being of illegitimate children as to those who are legitimate. 411 U.S. 619, 620.

It is incontrovertible that the benefits extended under the Social Security Old Age, Survivors, and Disability Insurance program are as necessary to illegitimate children as to those who are legitimate, and that the time of the birth of the illegitimate child, in relation to the onset of his father's disability is as irrelevant for an illegitimate child's need for support as for that of a legitimate child.

Section 216(h)(3) of the Social Security Act cannot pass the constitutional test mandated by this line of cases: the classification, here, of illegitimate children, is not reasonably related to the purpose of the Social Security Act, and is not justified by any appropriate governmental interest.

B. Blanket Exclusion of the Entire Classification of After-Born Illegitimate Children for the Purpose of Preventing Fraud Is Not a Suitable Means of Furthering an Appropriate Governmental Interest.

Despite the fact that the discrimination against illegitimate children does not further the primary governmental purpose of providing support to wage earners and their dependents, the Secretary of the Department of Health, Education and Welfare has contended that the discrimination against after-born illegitimate children created by the Act is not as arbitrary as it appears, that it is "reasonable" because it furthers a "governmental interest" in protecting the Social Security Trust Fund against spurious claims. He also claims that because children whose parents have never married each other would be less likely than other children to need replacement of lost support from their fathers, it is reasonable to distinguish such children within the Social Security Act. Thus, the Secretary implicitly concedes that the discrimination effected by section 216(h)(3) does not further the primary purpose of the Social Security Act, but contends that the discrimination suitably furthers a secondary but appropriate governmental interest, the saving of administrative time, effort, and money by the elimination of individualized screening of every applicant.

The District Court erroneously relied on the Secretary's contentions in upholding section 216(h)(3) (*Jimenez v. Richardson*, 353 F. Supp. 1356 (1973)). Its finding that the exclusion of after-born illegitimate children from eligibility for Social Security benefits is constitutionally permissible in order to prevent spurious claims is erroneous.

Just one year ago this Court specifically held that the spectre of fraud cannot excuse invidious discrimination against illegitimate children.

> We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination. *Stanley v. Illinois*, 405 U.S. 645, 656-657 (1972); *Carrington v. Rash*, 380 U.S. 89 (1965); *Gomez v. Perez*, 409 U.S. 535 (1973).

The "impenetrable barrier" against after-born children could be removed from section 216(h)(3) without lightly brushing aside potential problems with respect to fraud. For purposes of Title II eligibility, legitimate children are presumed to be the children of their mother's husbands; illegitimate children must prove their paternity. The sections relating to illegitimate children describe the criteria by which paternity must be satisfactorily established. Thus, the requirements of written acknowledgement, court orders, or other reasonable proof satisfactory to the Secretary are themselves designed to prevent and are effective in preventing fraudulent claims. To require proof of paternity for illegitimate children is not unreasonable, and is not challenged here. However, the requirement that in order to be permitted to have the opportunity to offer proof of paternity an illegitimate child must have been born and have met the other requirements before the event that established his father's eligibility for Social Security benefits is arbitrary and irrational. The rule's sweep is so broad, barring all after-born illegitimate children, that it bears no reasonable relation to screening for fraud. The credibility of relevant proof of a child's paternity is not affected by his date of birth. It is reasonable to demand proof of this

relationship, but unreasonable to refuse to even consider proof—that might in fact be perfectly acceptable—simply because the child-applicant was born after the onset of his father's "old-age" or disability. The denial of any opportunity to present relevant proof is not an administrative mechanism rationally related to the purpose of preventing fraud.

As the dissenting judge in the District Court in this case stated:

> Significantly, the Court was not unmindful in these cases [*Weber, Richardson v. Davis, Richardson v. Griffin*] that children born out of wedlock presented difficult problems of proof as to actual dependency. In *Weber*, the Court indicated that they would respect a state's method of determining the genuineness of individual claims. However, the Court made it clear that once dependency was established, the Constitution required that all dependents—whether legitimate or illegitimate—must be treated equally. 406 U.S. at 175.
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> While I would agree that the need to guard against fraudulent claims is surely a valid legislative goal, I cannot agree that a total exclusion of a class of claims—some of which will be demonstrably valid—is a reasonable means of achieving that goal. 353 F. Supp. 1356, 1362 (1973).

The irrationality and the superfluousness of the "before-born" requirement of section 216(h)(3) is most easily apparent from a consideration of the Social Security Act itself. Under section 216(h)(3)(C), an illegitimate child may offer proof of his paternity and qualify for survivor's benefits if he was acknowledged before his father's death. In other words, a child who is conclusively presumed ineligible for benefits while his

father is alive may receive survivor's benefits when his father dies. Thus Ramon Jimenez's acknowledgement of Eugenio and Alicia does not avail them now, but would after his death. Surely the evidence of paternity or support, identical under the statute for both disability and survivors' benefits, does not gain in probative value simply because the father dies.

Similarly, Eugenio and Alicia would currently be eligible if they lived in a State that allowed them to inherit in intestacy under Section 216(h)(2)(A), because they would be permitted to offer proof that they were being supported by their fathers at the time applications were filed on their behalf. The Secretary has never offered proof that he has been unable to avoid widespread, or even occasional fraud, in those jurisdictions that allow illegitimate children to inherit from their fathers,[18] even though in these jurisdictions—twenty-four in number—illegitimate children born or acknowledged after their wage earner fathers became disabled or "aged" need not have been born before the event that established their parent's eligibility, and such children are constantly found eligible for child's insurance benefits.[19] Presum-

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[18]The District Court opinion seems to imply that the Secretary did offer such proof in letters submitted to the Court after oral argument. In fact, however, these letters (filed with the district court November 6, 1972) contained only *hypothetical* examples of situations in which a wage earner could obtain an increase in the total benefits paid on his account by falsely acknowledging a child not his own. There is no suggestion of a single instance in which such fraud actually occurred.

[19]Twenty-four states allow illegitimate children to inherit from their fathers; twenty-three are listed in *Labine v. Vincent*, 401 U.S. 532, 557 (1971), and see Maryland Code Ann., Art. 93, Sec. 1-208.

ably, problems of fraud identical to those under section 216(h)(3) are posed in those jurisdictions that allow illegitimate children to inherit. If the Social Security Administration is capable of detecting and preventing fraud in these jurisdictions, it should also be capable of doing so in other jurisdictions. The fact that it has not adduced examples of actual fraud where it is presently possible for after-born illegitimate children to receive benefits suggests that, as in *Mayers v. Ridley*, "the parade of horribles to which appellees point is largely imaginary." 465 F.2d 630, 641 (D.D.C. 1972).

The case of *U.S. Department of Agriculture v. Moreno*, ___ U.S. ___, 37 L.Ed.2d 782 (1973), provides a useful analogy for the purposes of evaluating the Secretary's justification of the discrimination against after-born illegitimate children. In *Moreno*, a section of the Food Stamp Act (§3(e) of 7 U.S.C. §2012(e)) declared ineligible any household whose members were not all related. The plaintiffs claimed that the section violated the constitutional guarantee of due process by classifying households arbitrarily along lines that had no rational relationship to the purpose of the Act. The Government defended the section, as does the Secretary here, on the ground that it lessened administrative burdens and prevented fraud. The Court found no rational relation between the fact of unrelated household members and the purpose of the Act. Left, as in the instant case, with no other justification for the section, the Government maintained (___ U.S. ___, 37 L.Ed.2d 782, 788)

> that the challenged classification should nevertheless be upheld as rationally related to the clearly legitimate governmental interest in minimizing fraud in the administration of the food stamp program. In essence, the Government contends that in adopting

the 1971 amendment (section 3), Congress might rationally have thought (1) that households with one or more unrelated members are more likely than "fully related" households to contain individuals who abuse the program by fraudulently failing to report sources of income or by voluntarily remaining poor; and (2) that such households are relatively unstable, thereby increasing the difficulty of detecting such abuses. But even if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning the differences between "related" and "unrelated" households, we still could not agree with the Government's conclusion that the denial of essential federal food assistance to *all* otherwise eligible households containing unrelated members constitutes a rational effort to deal with these concerns.

At the outset, it is important to note that the Food Stamp Act itself contains provisions wholly independent of §3(e), aimed specifically at the problems of fraud and of the voluntarily poor. For example, with certain exceptions, §5(c) of the Act [citations omitted], renders ineligible for assistance any household containing "an able-bodied adult person between the ages of eighteen and sixty-five" who fails to register for, and accept, offered employment. Similarly, §14(b) and (c) [citations omitted], specifically impose strict criminal penalties upon any individual who obtains or uses food stamps fraudulently. The existence of these provisions necessarily casts considerable doubt upon the proposition that the 1971 amendment could rationally have been intended to prevent those very same abuses. See *Eisenstadt v. Baird*, 405 U.S. 438, 452, 31 L.Ed.2d 439, 92 S.Ct. 1029 (1972); cf. *Dunn v. Blumstein*, 405 U.S. 330, 353-354, 31 L.Ed.2d 274, 92 S.Ct. 995 (1972)

Extensive quotation from *Moreno* is appropriate because the analogy to the present case is so pointed. In *Moreno*, as here, the Government contended that members of the disputed class are less "likely" to be eligible to receive benefits, and that the exclusion of the group as a whole would prevent fraudulent applications. And in *Moreno*, the government's factual assumptions, like the assumption about the likelihood of past support in this case (discussed below), was "wholly unsubstantiated." Moreover, here as in *Moreno*, even if the government's factual assumptions were true, they would not provide a constitutionally acceptable basis for exclusion of "all otherwise eligible" applicants. And in both cases there exist other statutory means of preventing fraud, which, as this Court recognized, "casts considerable doubt upon the proposition" that the section in question "could rationally have been intended to prevent those very same abuses." *Moreno* at 405 U.S. 330, 354. The Social Security Act contains provisions, exactly analogous to those referred to in *Moreno*, to prevent fraud. Section 216(h)(3) itself, by definition, excludes those children who do not have the right to support from their fathers. The Social Security Administration has, and exercises, the authority to require reasonable individualized proof of all claims for benefits. Each claim is in fact reviewed on the basis of individual merit. 42 U.S.C. §405; 20 C.F.R. §404.722; *Social Security Handbook*, SSI-135, 1969, §170ff; Social Security Administration Claims Manual, §2431ff. In addition, just as in the Food Stamp situation, the Administration may subject a wrongful claimant to prosecution for a misdemeanor, pursuant to 42 U.S.C. §408, and may recoup all benefits wrongfully paid, 42 U.S.C. §404.

The Secretary's claim that the exclusion of after-born illegitimate children prevents fraud is an attempt to

justify an unconstitutional irrebuttable presumption: that all illegitimate child-applicants who are born after the onset of their alleged father's disability or old-age are in fact not the children of the fathers on whose account they apply for benefits.

A legitimate child born after his father becomes disabled or "aged" is eligible for benefits. An illegitimate child born after his father becomes disabled or "aged" is not even given an opportunity to prove that he has been acknowledged or supported by his insured father, or that he has met any of the qualifications that would make him eligible. Even if the child, as Eugenio and Alicia Jimenez, has been acknowledged by the father in writing, been supported and nurtured by him, and is living with him, he cannot prove these things to the Social Security Administration and so become eligible for benefits. An after-born legitimate child is conclusively presumed to be eligible. An after-born illegitimate child is irrebuttably presumed to be ineligible.

There is no relationship between the known fact: birth after the onset of disability or "old-age" and the presumed fact: the fraudulent nature of the claim. The presumption is therefore constitutionally invalid, because to meet due process standards, some significant nexus must exist between the two "facts." See, *United States v. Romano*, 382 U.S. 136 (1965); *Heiner v. Donnan*, 285 U.S. 213 (1932). This case is thus similar to *U.S. Dept. of Agriculture v. Murry*, ___ U.S. ___, 37 L.Ed.2d 767 (1973), in which this Court invalidated a section of the Food Stamp Act because it created an irrebuttable presumption linking a fact–tax dependency in a prior year–with another fact–need of the dependent for food stamps in the following year–when there was no real relation between the two. This Court struck the presumption down because such a linkage "rests on an irrebut-

table presumption often contrary to fact [and] therefore lacks critical ingredients of due process found wanting in *Vlandis v. Kline*, 410 U.S. ___ (1973); *Stanley v. Illinois, supra*; and *Bell v. Burson*, 402 U.S. 535." *U.S. Dept. of Ag. v. Murry*, ___ U.S. ___, 37 L.Ed.2d 767, 773 (1973).

The Social Security Administration, having other devices to prevent fraud, is simply attempting to avoid the marginal administrative cost and effort involved in individual screening of after-born illegitimate children by arbitrarily excluding the entire group. The exclusion is clearly not necessary to prevent spurious claims; it is merely a short cut to prevention of fraud.

The government may well have a legitimate interest in efficient administration, but this Court has repeatedly ruled that efficiency alone cannot be decisive:

> . . . it may be argued that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's. The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizen from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. *Stanley v. Illinois*, 410 U.S. 645, 656.

And see *U.S. Department of Agriculture v. Murry*, ___ U.S. ___, 37 L.Ed.2d 767 (1973); *Frontiero v. Richardson*, 411 U.S. 677 (1973). The promotion of efficiency is

not an "appropriate" governmental interest, if it subverts the primary governmental interest expressed by an act as a whole. The section in question here and the attempted justification of it must be studied in their effect on the purpose of Title II of the Social Security Act.

Classifications made within the Social Security Act, for the purpose of increasing efficiency, can be acceptable only if they do not interfere with the primary goal of the Act, the provision of support to wage earners and their dependents in time of old age, sickness, or death. A classification could be "appropriate" even if it did not itself further the primary goal of the legislation, as long as it did not defeat that main purpose, and if it promoted some appropriate secondary purpose in a "suitable" manner. The classification here complained of does in fact interfere with the primary purpose of the Social Security Act, as it deprives some otherwise eligible children of Social Security benefits. The speculative possibility that many applicants would be found ineligible does not justify the "blunderbuss" exclusion of all the possible applicants. *Shapiro v. Thompson*, 394 U.S. 618, 637 (1969). "... [T]he means the State employs must be precisely drawn in light of the acknowledged purpose." *Sugarman v. Dougall*, ___ U.S. ___, 37 L.Ed.2d 853 (1973).

C. The Relative Likelihood of Support for All Illegitimate Children Is Irrelevant Because the Statutory Scheme Requires That Each Individual Applicant Prove His Eligibility and Because Actual Receipt of Support Is Not Determinative of Eligibility.

The classification of after-born illegitimate children is so irrational and indefensible in relation to the overall

purpose of the Social Security Act that the Secretary has never seriously attempted to justify it on any grounds except as a measure to prevent fraud, discussed above. The Secretary has, however, advanced an additional justification for the invidious discrimination against after-born illegitimate children. In this theory, which was, appropriately, passed over lightly by the District Court, the Secretary claims that the Social Security Act is meant to compensate children for loss of support from an aged, disabled, or deceased parent, that illegitimate children are less likely to have been supported, and so to have suffered a loss when their parent ceased working, and that therefore the classification is reasonably related to the purposes of the Social Security Act.

In *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), this Court was faced with a similar argument in relation to the Louisiana Workmen's Compensation laws, which denied benefits to dependent unacknowledged illegitimate children. The State there contended that the exclusion of unacknowledged illegitimate children was reasonable because such children as a group were less likely to have been living with or supported by their fathers. The Court rejected this theory on the grounds that it was not compelling in a statutory scheme in which each individual must prove dependency on the deceased as a prerequisite to recovery. The Court's logic is directly applicable in the instant case. The likelihood of support for all illegitimate children as a group cannot be compelling in the context of the Social Security Act in which each individual applicant must prove that he or she meets the specific eligibility requirements as a prerequisite to receiving benefits. Indeed the likelihood of support is even less relevant here than it was in *Weber* because actual dependency is not a prerequisite to establishing eligibility in all cases; eligibility is frequently

founded on the existence of a legal right to support. A legitimate child or an acknowledged illegitimate child, for example, need not prove dependency; they are deemed dependent by virtue of section 202(d).

The Secretary's argument is irrelevant and misleading for another reason. The Social Security Act does not require past experience of support any more than it requires present support. That it does not require present support in all cases is apprent from the fact that legitimate children are deemed to be supported, whether or not they ever actually receive money from their parents, under section 202(d). That the Act does not require *past* experience of support is shown by the eligibility of after-born legitimate children. After-born legitimate children can of course have no more experience of support from current earnings than can after-born illegitimate children. The Secretary's argument further crystallizes the pure discrimination between legitimate and illegitimate children. Once again the Secretary has not advanced a reasonable justification, but rather has tried to defend a discriminatory irrebuttable presumption which only masks concern for administrative efficiency.

III.

THE DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN WORKED BY SECTION 216(h)(3) MUST BE IN FURTHERANCE OF A COMPELLING GOVERNMENTAL INTEREST IN ORDER TO BE CONSTITUTIONALLY ACCEPTABLE.

Judged by the most lenient of equal protection standards, the discrimination against after-born illegitimate children effected by Section 216(h)(3) is unconstitutional. The Court is not, however, limited to

this most lenient standard. Illegitimacy is properly a suspect classification and discrimination against illegitimates can be justified only by a compelling governmental interest.

A. Illegitimacy Is a Suspect Classification.

Illegitimacy should be explicitly recognized as a "suspect classification,"[20] for it shares all of the relevant characteristics that have been the bases for the Court's designations of other classifications as "suspect." Recently, four members of this Court, in expressing the view that classifications based on sex are suspect, *Frontiero v. Richardson*, 411 U.S. 677 (1973), described certain criteria particular to suspect classes. Illegitimacy has the characteristics so described. Illegitimacy, like sex, "like race and national origin, is an immutable characteristic determined solely by the accident of birth, [therefore] the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . .' *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972). And what differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized

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[20]The lack of a clear equal protection standard to be applied to illegitimacy has caused considerable confusion among lower courts, which would be eliminated by a clarification of this Court's position. Compare, *Miller v. Laird*, 349 F. Supp. 1034, 1039-43 (D.D.C. 1972); *Jimenez v. Richardson*, 353 F. Supp. 1356 (D. Ill. 1972); *Severance v. Weinberger*, 362 F. Supp. 1348 (D.D.C. 1973); *Weinberger v. Beaty*, 478 F.2d 300 (1973).

suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). The reliance on *Weber*, an illegitimacy case, is logical and appropriate. Illegitimacy, like race, national origin and sex is an unalterable condition, a condition over which the children so labeled have no control, a condition they are powerless to change; a condition bearing no relation to ability to perform or to contribute to society; a condition bearing no relationship to individual responsibility.

This Court has recognized, in many cases dealing with classifications based on race and national origin, that to base distinctions between people on the basis of conditions of birth or ancestry is constitutionally suspect. See, e.g., *McLaughlin v. Florida*, 379 U.S. 185 (1964); *Korematsu v. United States*, 323 U.S. 214 (1944); *Oyama v. California*, 332 U.S. 633 (1945). "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1942).

The stigma associated with racial classifications has been a major factor in the Court's treatment of race as a suspect class. Illegitimacy shares with race the fact that designation by these classifications subjects a child to "a stigma of inferiority and a badge of opprobrium."[21]

This Court has already clearly recognized that illegitimate children share this experience of social humiliation with other suspect classes, in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972):

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[21] "Development in the Law of Equal Protection," 82 Harv. L. Rev., 1065 (1969).

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the *social opprobrium suffered by these hapless children*, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth[14] where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise. 406 U.S. 164, 175-176.[22]

The sociological and psychological literature more than supports the Court's understanding of the opprobrium suffered by illegitimate children. See, for example, H. Krause, *Legitimacy: Law and Social Policy* (1971); Foder, "Emotional Trauma Resulting From Illegitmate Birth," 54 *Archives of Neurology and Psychiatry* 381 (1945); "Illegitimacy," Vol. 7, *Encyclopedia of the Social Sciences*, 579 (1935). The likelihood that any classification on the basis of illegitimacy will subject a child so classified to such opprobrium, ridicule and

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[22]Emphasis added. Footnote 13 is omitted. Footnote 14 states: "See *Graham v. Richardson*, 403 U.S. 365 (1971); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Brown v. Board of Education*, 347 U.S. 483 (1954); and see also *Hirabayashi v. United States*, 320 U.S. 81 (1943)." All of the cases referred to concern suspect classifications.

condemnation, is great enough to establish differential treatment of illegitimacy as suspect.

Moreover, illegitimate children are a "discrete and insular minority," needing special protection by the courts. See Mr. Justice Stone's footnote to *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153, n.4 (1938). Nine and seven-tenths per cent of all live births in 1968 in the United States were illegitimate[23] but these children do not wield the influence that their numbers warrant (a criterion suggested by Justice Stone), and so are subject too easily to statutory discrimination. Illegitimate children, as a group, bear "the traditional indicia of suspectness" described by the Court in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973). They are

> . . . saddled with such disabilities, or subject to such a history of purposeful inequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection . . .

This Court seems to have implicitly recognized, in *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972), that illegitimacy is a suspect class, as is illustrated by the passage quoted above, at p. 41. Indeed, at least some members of the Court believe that the classification of illegitimacy has already been recognized, at least in certain contexts, to be suspect. See, Mr. Justice Stewart, concurring, in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 60, and Justices Douglas and Marshall, dissenting, at p. 108. See also, *Frontiero v. Richardson*, 411 U.S. 677, 681 (1973).

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[23]Statistical Abstracts of the United States, 1973, 94th Annual Edition, U.S. Dept. of Commerce.

Illegitimacy should thus be treated explicitly in this case as a suspect class, as it shares all the crucial criteria with race and national origin.

B. The Discrimination Against After-Born Illegitimate Children Is Not Justified by Any Compelling Governmental Interest, and so Must Be Found Unconstitutional.

Because the classification of the illegitimacy is properly suspect, statutes discriminating against illegitimates must be subject to strict judicial scrutiny, and may be found constitutionally sound only if the classification is necessary for the promotion of a compelling state interest. *Oyama v. California*, 332 U.S. 633 (1948); *Kramer v. Union Free School District*, 395 U.S. 621 (1969).

The classification of children according to their illegitimate status in the Social Security Act is not even rationally related to the purpose of that Act, as was discussed in Section II-B, *supra*. The discrimination is not necessary to the advancement of any constitutionally legitimate governmental purpose, much less a compelling purpose.

As appellants have shown, the primary justification suggested by the Secretary for the discrimination worked by Section 216(h)(3) is that it prevents spurious claims. One test of whether a statutory classification is necessary to the achievement of a compelling state interest is whether it is "tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goals." *Kramer v. Union Free School District*, 395 U.S. 621, 632. Here, the *articulated* goal is the prevention of spurious claims. Quite obviously, the total exclusion of plaintiffs and their class is not

necessary to prevent spurious claims: Fraudulent claims can be weeded out by the Secretary's regular examination of each individual applicant. Individual screening may well involve some additional administrative effort, but the saving of administrative effort, legitimate though it may be, is not a "compelling" governmental interest. In *Oyama v. California*, this Court stated that "only the most exceptional circumstances can excuse discrimination" on the basis of racial descent. 332 U.S. 633, 646. The desirability of administrative efficiency is universal: it would always be preferable to administer government efficiently. But the need for efficiency is hardly an exceptional circumstance, so compelling as to justify this discrimination. As four justices of this Court recently stated:

> When we enter the realm of "strict judicial screening," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality. See, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Carrington v. Rash*, 380 U.S. 89 (1965).
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> *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973).

CONCLUSION

Section 216(h)(3) of the Social Security Act (42 U.S.C. §416(h)(3)) violates the constitutional guarantee of equal protection of the law as it is embodied in the Due Process Clause of the Fifth Amendment.

For this reason, it is respectfully submitted that the judgment of the district court should be reversed and that court directed to order the Secretary of Health, Education and Welfare to cease enforcement of that portion of Section 216(h)(3) here challenged; to find Eugenio

and Alicia Jimenez eligible to receive child's insurance benefits; and to make restitution to them for Social Security benefits wrongfully denied from the date of their application. Further, it is submitted that the case should be remanded to the district court for consideration of proper relief with respect to restitution for members of the plaintiff class.

Respectfully submitted,

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